

TAN SIEW CHIN SDN BHD

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v.

PERBADANAN PENGURUSAN SRI PANTAI

COURT OF APPEAL, PUTRAJAYA

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ABU SAMAH NORDIN JCA

HISHAMUDIN MOHD YUNUS JCA

BALIA YUSOF WAHI JCA

[CIVIL APPEAL NO: P-02(NCVC)-2681-10-2011]

26 DECEMBER 2012

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CIVIL PROCEDURE: *Res judicata* - Principles of - Whether doctrine of *res judicata* extends to all other causes of action or issues which should have been litigated in original earlier action - Allowing a party to bring new proceedings - Whether an abuse of court process

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CIVIL PROCEDURE: *Summons in chambers* - Interlocutory orders - Application for - Preliminary determination on questions of law by court - Respondent's claim struck out for disclosing no reasonable cause of action - Further order by court granting respondent liberty to file fresh proceedings based on any other cause of action - Whether learned judge erred in making further order - Whether respondent barred from bringing fresh action for same relief or remedy - *Res judicata* - Principle of - Rules of the High Court 1980, O. 14A

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The appellant, the original owner of a piece of land ('condominium land') on which a condominium, Gurney Beach Resort Condominium ('Gurney Beach Condominium') was built and the developer of the said condominium, Gurney Resorts Corporation Sdn Bhd ('GR Corporation') entered into a joint venture agreement ('the JVA'). The essence of the JVA was that the appellant agreed to the transferring of the condominium land to GR Corporation; and in return, GR Corporation agreed to construct the Gurney Beach Condominium at its own costs and expenses, and thereafter to transfer 48 units of apartments to the appellant ('the appellant's units'). The respondent, the management corporation of Gurney Beach Condominium, in seeking to claim against the appellant for service charges allegedly owing in the sum of RM2,530,229.02, submitted that the appellant was liable to pay the developer maintenance or service

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- A charges for each of the appellant's units. The appellant's defence was that it had never executed any sale and purchase agreement or any deed of mutual covenants with the developer in respect of the appellant's units. Further, nowhere under the joint venture agreement did it state that the appellant was obliged to pay GR
- B Corporation service charges for the appellant's units from the time vacant possession of the appellant's units was given to the appellant until the establishment of the management corporation. The appellant took out a summons in chambers pursuant to O. 14A of the Rules of the High Court 1980 ('RHC'), which was
- C accordingly allowed by the High Court. The High Court judge ordered that the entire action relating to the respondent's claim against the appellant for service charges be struck out for disclosing no reasonable cause of action. However, the learned judge also made a further order to the effect that the respondent
- D be granted liberty to file fresh proceedings based on any other cause of action against the appellant relating to the alleged service charges as claimed by the respondent in the action. The present appeal herein was against that part of the decision of the High Court Judge in allowing the respondent liberty to file fresh
- E proceedings against the appellant.

Held (allowing appeal with costs)

Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

- F (1) The learned judge erred in law in ruling that the striking out of the respondent's action against the appellant (pursuant to the O. 14A of the RHC application) did not bar the respondent from bringing a fresh action for the same relief or
- G remedy based on other 'factual foundation'. The doctrine of *res judicata* is not confined only to causes of action or issues in respect of which the court is actually asked to decide or has already decided. The doctrine also extends to all other causes of action or issues which should have been litigated or
- H asserted in the original earlier action, but were not brought forward deliberately or due to inadvertence or negligence resulting in the final judgment; and that it would be an abuse of process to allow a party to bring new proceeding to be started in respect of them (*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd*, refd). (para 21)
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Bahasa Malaysia Translation Of Headnotes

Perayu, pemilik asal tanah ('tanah kondominium') di mana sebuah kondominium, Gurney Beach Resort Condominium ('Gurney Beach Condominium') telah dibina dan pemaju kondominium tersebut, Gurney Resorts Corporation Sdn Bhd ('GR Corporation') telah memeterai satu perjanjian usahasama ('PU'). Intipati PU tersebut adalah perayu bersetuju untuk memindahkan tanah kondominium kepada GR Corporation; dan sebagai balasan, GR Corporation bersetuju untuk membina Gurney Beach Condominium pada kos dan perbelanjaannya sendiri, dan untuk memindahkan 48 unit pangsapuri kepada perayu ('unit-unit perayu'). Responden, perbadanan pengurusan Gurney Beach Condominium, dalam membuat tuntutan caj-caj perkhidmatan terhadap perayu berjumlah RM2,530,229.02, menghujahkan bahawa perayu bertanggung membayar pemaju caj-caj penyelenggaraan atau perkhidmatan bagi setiap unit perayu. Pembelaan perayu adalah ia tidak pernah melaksanakan apa-apa perjanjian jual beli atau surat ikatan perjanjian bersama dengan pemaju berkenaan unit-unit perayu. Seterusnya, tidak terdapat dalam perjanjian usahasama bahawa perayu diwajibkan membayar GR Corporation caj-caj perkhidmatan untuk unit-unit perayu daripada masa milikan kosong unit-unit perayu diberi kepada perayu sehingga penubuhan perbadanan pengurusan. Perayu memasukkan saman dalam kamar di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), yang telah dibenarkan oleh Mahkamah Tinggi. Hakim Mahkamah Tinggi memerintahkan supaya seluruh tindakan berhubungan tuntutan responden terhadap perayu untuk caj-caj perkhidmatan dibatalkan atas kegagalan mengemukakan kausa tindakan yang munasabah. Walau bagaimanapun, yang arif hakim juga membuat perintah lanjut bahawa responden diberikan kebebasan untuk memfailkan prosiding baru berdasarkan apa-apa kausa tindakan terhadap perayu yang berkaitan dengan caj-caj perkhidmatan yang didakwa seperti yang dituntut oleh responden di dalam tindakan. Rayuan ini adalah terhadap sebahagian keputusan Hakim Mahkamah Tinggi dalam membenarkan responden kebebasan untuk memfailkan prosiding baru terhadap perayu.

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**A Diputuskan (membenarkan rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan
penghakiman mahkamah:**

- B** (1) Yang arif hakim telah terkhilaf dari segi undang-undang dalam memutuskan bahawa pembatalan tindakan responden terhadap perayu (di bawah permohonan A. 14A KMT) tidak menghalang responden daripada memfailkan tindakan baru untuk relif dan remedi yang sama berdasarkan asas fakta-fakta lain. Doktrin *res judicata* tidak terhad kepada kausa-kaus
- C** tindakan atau isu-isu yang mahkamah diminta memutuskan atau telah memutuskan. Doktrin juga meliputi kesemua kausa-kaus
- D** tindakan yang lain atau isu-isu yang sepatutnya dilitigasikan atau ditegaskan di dalam tindakan asal terdahulu, tetapi dengan sengaja tidak dibawa ke hadapan atau disebabkan kelalaian atau kecuai
- E** an yang mengakibatkan penghakiman muktamad, dan bahawa ia akan menjadi satu penyalahgunaan proses untuk membenarkan pihak membawa prosiding baru untuk dimulakan berkaitan perkara tersebut (*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd*, dirujuk).

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (*refd*)

F Legislation referred to:

Rules of the High Court 1980, O. 14A

For the appellant - Lim Hock Siang; M/s Presgrave & Matthews

For the respondent - Daphne Choy; M/s Choy & Assocs

- G** [Editor's note: *For the High Court judgment, please see Perbadanan Pengurusan Sri Pantai v. Tan Siew Chin Sdn Bhd* [2011] 1 LNS 1356]

Reported by Suhainah Wahiduddin

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JUDGMENT

Hishamudin Mohd Yunus JCA:

- I** [1] This appeal is against the decision of the High Court of Malaya, Penang, a decision delivered on 28 September 2011.

[2] On 27 February 2012 we unanimously allowed the appeal with costs. A

[3] We now give our grounds for allowing the appeal.

[4] The decision of the High Court was on an interlocutory matter - a summons in chambers application (encl. 6) of the appellant (the defendant before the High Court) pursuant to O. 14A of the Rules of the High Court 1980; for the High Court to make a preliminary determination on certain questions of law, without the necessity of proceeding to trial; that would dispose off the action one way or other. B C

[5] In order to understand the respondent's claim against the appellant, we have to allude to the background facts. Briefly, they are as follows.

[6] The respondent is the management corporation of a condominium known as 'Gurney Beach Resort Condominium' (which shall be referred to in this judgment as the 'Gurney Beach Condominium'). D

[7] The respondent was established on 21 November 2007 pursuant to the Strata Titles Act 1985. E

[8] The appellant was the original owner of the land on which Gurney Beach Condominium is built (in this judgment we will be referring to this land as the 'condominium land'). F

[9] The developer of the Gurney Beach Condominium is a company called 'Gurney Resorts Corporation Sdn Bhd' (in this judgment, this company will be referred to as 'GR Corporation').

[10] On 19 May 1995, the appellant and GR Corporation entered into a joint venture agreement (the 'JVA') to build the Gurney Beach Condominium on the condominium land. Subsequently, a supplemental agreement dated 21 June 1996 was executed to vary some of the terms of the JVA. For convenience, we will be referring to these two agreements collectively as the 'joint venture agreements'. G H

[11] The essence of the joint venture agreements was that the appellant agreed to the transferring of the condominium land to GR Corporation; and, in return, GR Corporation agreed to construct the Gurney Beach Condominium at its own costs and I

A expense, and, thereafter, to transfer 48 units of apartments in the Gurney Beach Condominium to the appellant (these 48 units will be referred to in this judgment as ‘the appellant’s units’).

B [12] There is no provision in the joint venture agreements that stipulates that the appellant was under an obligation to pay GR Corporation service charges in respect of the appellant’s units from the time vacant possession of the appellant’s units was given to the appellant until the establishment of the management corporation.

C [13] GR Corporation completed the construction of the Gurney Beach Condominium sometime in October 1998.

D [14] In its statement of claim, the respondent seeks to claim against the appellant service charges (allegedly) owing prior to the establishment of the respondent totalling RM2,530,229.02. It is alleged that the appellant had executed sale and purchase agreements and deeds of mutual covenants with the developer in respect of the appellant’s units; and that the appellant is liable to pay the developer maintenance or service charges for each of the
E appellant’s units. It is also alleged that prior to the incorporation of the respondent on 21 November 2007, the appellant owed the developer maintenance or service charges for a period of 10 years from October 1998 to July 2007 amounting to RM2,530,229.02. It is further alleged that the developer had allegedly assigned the
F alleged debt to the respondent with effect from 1 August 2007.

[15] The main thrust of the appellant’s defence is as follows:

- G (a) the appellant had never executed any sale and purchase agreement or any deed of mutual covenants with the developer in respect of the appellant’s units;
- (b) the only agreements entered into between the appellant and the developer are the joint venture agreements;
- H (c) there is no express provision under the joint venture agreements requiring the appellant to pay the developer maintenance or service charges in respect of the appellant’s units; and

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- (d) therefore, the developer could not have any right to impose maintenance or service charges on the appellant, and it follows that there is no debt owing by the appellant to the developer which the latter could in turn assign to the respondent. A

[16] On 7 June 2011, the appellant took out a summons in chambers pursuant to O. 14A of the Rules of the High Court 1980 for, *inter alia*: B

- (1) the following questions of law be determined without the need for the full trial of the action, namely: C

- (a) Whether, in the absence of any sale and purchase agreement and/or deed of mutual covenants entered into between the appellant and the developer, GR Corporation Sdn Bhd, imposing an obligation on the appellant to pay to GR Corporation maintenance or service charges for each of the appellant's units for the purposes of maintaining and managing the common properties of Gurney Beach Condominium, the appellant is under no legal obligation to pay either GR Corporation or the respondent for any maintenance or service charges from the time the construction of the condominium was completed in October 1998 to the time when the management of the condominium was taken over by the respondent in July 2007. D E

- (b) Whether, in the absence of any provision in the joint venture agreements imposing an obligation on the appellant to pay to GR Corporation maintenance or service charges for each of the appellant's units in the condominium for the purposes of maintaining and managing the common properties of the Gurney Beach Condominium, the appellant is under no legal obligation to pay either GR Corporation or the respondent any maintenance or service charges from the time the construction of the condominium was completed in October 1998 to the time when the management of the condominium was taken over by the respondent in July 2007. F G H

- (c) If the answer to (a) and (b) above is in the affirmative, whether the matters pleaded in the statement of claim disclose a cause of action against the appellant. I

A [17] The learned High Court Judge answered questions (1)(a) and (b) above in the affirmative and question (c) in the negative; and, accordingly, allowed the appellant's O. 14A application. He ordered that the entire action relating to the respondent's claim against the appellant for service charges be struck out for disclosing no reasonable cause of action. However, the learned judge also made a further order to the effect that the respondent be granted liberty to file fresh proceedings based on any other cause of action against the appellant relating to the alleged service charges as claimed by the respondent in the action.

C [18] The present appeal is limited to that part of the decision of the learned High Court Judge in allowing the respondent liberty to file fresh proceedings against the appellant in relation the alleged service charges as claimed by the respondent in the action (and which had been struck out) 'based on any other cause of action'.

D [19] The learned High Court Judge, in his grounds of judgment, explained as to why he allowed the respondent 'liberty to file fresh proceedings ... based on any other cause of action' in the following manner:

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Liberty to File Fresh Proceedings - Reasons

F 13. The cause of action which was founded on the alleged existence of a 'sale and purchase agreement' or 'deed of mutual covenants' was obviously a contractual one and in the admitted absence of any such documents, namely, the 'fact material to the plaintiff succeeding in their claim', it meant that the suit on that ground only was no longer sustainable.

G The question then to be considered was whether a withdrawal, discontinuance or a striking out of the suit in such circumstances would affect the right of the plaintiff to bring a claim for the same relief or remedy based on any other cause of action. I was of the view that the plaintiff could not be restricted from pursuing a similar claim based on any other valid or reasonable cause of action.

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I 14. It is trite that the material facts to raise a claim valid in law, that is, a cause of action, could arise in the context of an alleged 'contract' or 'tort' or even based on a statutory provision. That then formed the 'factual' foundation for the redress sought. In *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 (at p. 19) the Supreme Court defined 'cause of action' as:

... a statement of facts alleging that a plaintiff's right, either at law or by statute, has in some way or another, been adversely affected or prejudiced by the act of the defendant in an action.

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In *Indah Dera Saujana Corporation Sdn Bhd & 2 Ors v. James Foong Cheng Yuen* [2008] 2 AMR 6 (at p. 21) the Court of Appeal referred and adopted the definition of a reasonable cause of action as stated by Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232 (at p. 242) which was in the following words:

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A reasonable cause of action means simply a factual situation the existence of which entitles one person to obtain from the court a remedy against any other person.

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15. If the plaintiff was to bring a fresh proceeding against the defendant on similar contractual facts or context, of course it would cause prejudice and disadvantage to the defendant. The Court would not countenance any such move and the principle of *res judicata* could come to the aid of the defendant in any event.

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What then amounts to a "cause of action" is the factual situation giving rise or forming the basis of any claim for relief from the Court. The relief or remedy sought could remain the same but the 'factual situation' could be different.

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Therefore, it was my view, there was nothing in law or by way of policy to bar the plaintiff from bringing a fresh action for the same relief or remedy based on some other 'factual foundation' including any statutory provision or 'quasi-contract' or equitable scenario, so long as that fresh factual foundation had not been the subject of any previous litigation between the parties.

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[20] Learned counsel for the appellant submitted that the learned judge erred in law in ruling that the striking out of the respondent's action against the appellant (pursuant to the O. 14A application) did not bar the respondent from bringing a fresh action for the same relief or remedy based on 'other "factual foundation"'; citing the principle of *res judicata*.

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[21] With respect with agree with this submission that the learned judge had erred by making such a ruling. The doctrine of *res judicata* is not confined only to causes of action or issues in respect of which the court is actually asked to decide or has

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- A already decided. The doctrine also extends to all other causes of action or issues which should have been litigated or asserted in the original earlier action, but were not brought forward deliberately or due to inadvertence or negligence resulting in the final judgment, and that it would be an abuse of process to allow
- B a party to bring new proceeding to be started in respect of them. In this regard, we need only refer to the often-cited Supreme Court decision of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 where the scope and width of the principles of *res judicata* have been
- C comprehensively explained by Justice Peh Swee Chin FCJ. We feel it is unnecessary for us to repeat in our judgment those relevant passages of the judgment in that case.

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